Table of Contents

Sixth Circuit Court of Appeals No. 01-1824 Order Reversing and Remanding dated April 23, 2003, *McKenzie v. Smith*, 326 F.2d 721 (6th Cir. 2003) 1a-3a

United States District Court No. 99-CV-70316 Opinion and Order Adopting Report and Recommendation and Denying Petition dated June 4, 2001 ..... 14a-18a

United States District Court No. 99-CV-70316 Report and Recommendation dated March 29, 2001 ..... 19a-42a

Sixth Circuit Court of Appeals No. 98-0157 Order dated May 11, 1999 ..... 43a-44a

Michigan Supreme Court No. 106965 Order Denying Delayed Application for Leave to Appeal dated March 28, 1997 ..... 45a

Michigan Court of Appeals No. 191965 Order Denying Leave to Appeal dated June 10, 1996 ..... 46a

Recorder's Court for the City of Detroit No. 84-1886 Opinion and Order Denying Motion for Relief from Judgment dated January 18, 1995 .... 47a-48a

Sixth Circuit Court of Appeals Nos. 92-1283/ 92-1459 Order Denying Leave to Appeal dated May 14, 1992 ..... 49a-50a

Sixth Circuit Court of Appeals No. 92-1283/92-1459 Order Denying Rehearing dated June 19, 1992 ..... 51a

United States District Court No. 2:90-CV-300 Order Dismissing Petition for Writ of Habeas Corpus dated January 27, 1992 ..... 52a-53a

Michigan Supreme Court No. 86893 Order Denying Delayed Application for Leave to Appeal dated February 26, 1990 ..... 54a

Michigan Court of Appeals No. 116499 Order Denying Delayed Application for Leave to Appeal dated June 30, 1989 ..... 55a

United States District Court No. 86-CV-74475-DT Memorandum Opinion and Order dated January 29, 1987 ..... 56a-61a

Michigan Supreme Court No. 77352 Order Denying Application for Leave to Appeal dated March 26, 1986 ..... 62a

Michigan Court of Appeals No. 80131 Order Affirming Conviction dated September 19, 1985 ..... 63a-73a

Sixth Circuit Court of Appeals No. 01-1824 Order Denying Petition for Rehearing *En Banc* dated June 19, 2003 ..... 74a-75a

Statutes Involved
28 U.S.C. § 2241 ..... 76a
28 U.S.C. § 2244 ..... 77a
28 U.S.C. § 2254 ..... 79a

326 F.3d 721, *; 2003 U.S. App. LEXIS 7611, **;
2003 FED App. 0119P (6th Cir.), ***

GERALD MCKENZIE, Petitioner-Appellant,

v.

DAVID SMITH, Warden, Respondent-Appellee.

No. 01-1824

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

326 F.3d 721; 2003 U.S. App. LEXIS 7611; 2003 FED App. 0119P (6th Cir.)

September 17, 2002, Argued
April 23, 2003, Decided
April 23, 2003, Filed

SUBSEQUENT HISTORY: Rehearing, *en banc*, denied by *McKenzie v. Smith*, 2003 U.S. App. LEXIS 12561 (6th Cir., June 19, 2003)

JUDGES: Before: SILER, DAUGHTREY, and GILMAN, Circuit Judges.

OPINION BY: MARTHA CRAIG DAUGHTREY

OPINION: [*722]

MARTHA CRAIG DAUGHTREY, Circuit Judge. The petitioner, Gerald McKenzie, is a Michigan state prisoner who was convicted of assault with intent to murder and, as a result of that conviction, is serving a sentence of life imprisonment. He appeals the district court's judgment denying his petition for

a writ of habeas corpus, filed under 28 U.S.C. § 2254. For the reasons set out below, we conclude that the evidence introduced against McKenzie is constitutionally insufficient to sustain his conviction, and we therefore find it necessary to reverse the district court's denial of relief.

FACTUAL AND PROCEDURAL BACKGROUND

In 1984, a Michigan jury found Gerald McKenzie guilty of the attempted murder of his girlfriend's three-year-old daughter, in violation of MCLA § 750.83. The evidence at trial established that, in the early morning hours of March 7, 1984, a construction worker reporting for work in downtown Detroit encountered a woman he had never seen before. The woman, who was never identified, told the worker to enter a nearby vacant building. He did so and found a three-year-old girl lying unconscious on the floor of the unheated building. Although the temperature that morning was as low as seven degrees, the girl was dressed only in a T-shirt and overalls, without a coat, socks or shoes. A pool of blood from her head had frozen, sticking her face to the floor. The worker picked up the child and took her out of the building. He then found a police officer who took the child to the hospital.

[*723] When admitted to the hospital, the child, Quattura Sutton, was in critical condition and experiencing severe hypothermia. She had several severe bruises to her head that were, according to the emergency room physician, new and suggestive of abuse. The doctor further testified that Quattura was emotionally traumatized and was in an "acutely deranged abnormal condition." He described Quattura as "withdrawn" and said that she "did not appear normal psychologically for several weeks."

Quattura lived with her mother, Elena Carter, and Carter's boyfriend, petitioner McKenzie, at the home of Carter's aunt, Patricia. Patricia and her two children, Tonya and Wilbert, also

resided in the home, located around the corner from the vacant building in which Quattura was found. McKenzie and Carter had been dating for nearly three years and had been living together since Quattura was almost a year old. Both Carter and Carter's mother testified that although McKenzie was not Quattura's biological father, Quattura referred to him as "Daddy."

On the night of March 6, 1984, Carter and McKenzie spent the evening at home, both of them using drugs with a friend, Darrell Reed. They later walked Reed to the bus stop, returning home at 1:00 a.m. Carter testified that she told McKenzie she was going back out to borrow money to buy more drugs. McKenzie told Carter he was going to lie on the living room couch with Quattura. He said he would lock the door, and he told Carter that she should ring the doorbell when she returned. At the time, Patricia was upstairs in her bedroom, and her two children were on a couch in the dining room.

Carter admitted at trial that she had no intention of going out to get money that night. Rather, she intended to join another man, Johnny Williams, to do drugs. Carter said that she spent the remainder of the night with Williams and called her mother sometime after 11:00 a.m. on March 7, at which time she was told that Quattura was in the hospital.

After awakening on the morning of March 7, Patricia saw McKenzie sitting on the bed in the back bedroom and heard him making a crying noise. Patricia testified that McKenzie asked her if she had seen Quattura and told her that the child was not in the house. Patricia went downstairs looking for Quattura, but could not find her. She noted that the door was unlocked. Around noon, Patricia received word that Quattura was in the hospital.

Patricia's nine-year-old son Wilbert testified that he woke up the morning of March 7 when he heard McKenzie come into

the house through the front door. Wilbert stated that he saw McKenzie go up to his mother's bedroom and then into McKenzie's own bedroom, where he sat down and "made funny noises like he was crying."

Quattura's maternal grandmother, Juanita Horton, testified that she saw her granddaughter in the hospital at about 1:30 a.m. on March 8, the day after she was admitted. She described Quattura's condition as "drowsy" and said that the child was "in a lot of distress." Horton testified that she asked Quattura, "How is Grandma's baby?" Over a hearsay objection from McKenzie's lawyer, Horton testified that Quattura said, "See, Grandma, what my daddy did to me." The trial judge ruled that this statement qualified as an excited utterance and was therefore admissible as an exception to the hearsay rule. The parties had agreed that Quattura was not competent to testify, and she was not called as a witness at McKenzie's trial.

The parties stipulated that Quattura's hospital records contained a notation by a [*724] nurse who was present in the room around the same time and "had indicated she thought she heard [the child say] 'Donna,'" rather than "Daddy." However, the trial judge excluded evidence that Quattura, when asked two or three days later who had injured her, told the nurse, "Will did it." McKenzie's lawyer argued that the jury should be allowed to hear testimony concerning the "Will statement" because it was inconsistent with the "Daddy statement" introduced through testimony by Quattura's grandmother. The trial court, however, concluded that the statement "Will did it" was "not impeachment, as such," and excluded the evidence.

The state produced no physical evidence linking McKenzie to Quattura's assault. Lab technician Paula Lytle of the Detroit police department told the jury that she found Type O blood stains on a lamp shade taken from Quattura's home. According to Lytle, human blood of indeterminate type was also found at the foot of the staircase in the home. Lytle explained that her

testing revealed that Quattura had Type O blood. Lytle further testified that her analysis of McKenzie's boots came up negative for blood stains. On cross-examination, Lytle also acknowledged that hair fibers found on Quattura at the hospital were found to be "dissimilar" to samples taken from McKenzie.

Also during the state's case-in-chief, Elena Carter testified that she was unaware of McKenzie having ever hit Quattura in the past. Juanita Horton and Aaron Horton, Quattura's grandparents, testified to the same effect. Patricia said that McKenzie and Carter had been having disagreements about Carter's leaving and staying out late. However, Carter denied arguing with McKenzie that night, and she testified that McKenzie "wasn't upset" with her when she left the house.

McKenzie did not testify at his trial - or present any evidence at all - but statements that he made to police on March 7 and 8 were introduced into evidence by the prosecution. In his statements, McKenzie denied harming Quattura or removing her from the house. McKenzie did admit to using drugs earlier in the evening. He also said that he slept that night in an upstairs bedroom, not on the couch with Quattura, and did not become aware of the child's absence until he went downstairs at about 6:30 a.m.

After deliberating for four hours over a two-day period, the jury informed the trial court that it was deadlocked. The trial court rejected the defense's request for a mistrial and delivered an Allen charge. About four hours later, the jury returned with a guilty verdict. Subsequently, the trial judge sentenced McKenzie to a term of life imprisonment.

Since then, McKenzie's post-trial litigation, from direct appeal to the instant petition, has been lengthy and complex.

Direct Appeal

On direct appeal, McKenzie raised several issues: (1) that the Allen charge was unduly coercive; (2) that Quattura's statement to her grandmother was improperly admitted as an excited utterance; (3) that the trial court's application of the Michigan rules of evidence deprived him of due process and the right to confrontation; (4) that the prosecution's introduction of photographs of the injured child was unduly prejudicial; and (5) that his life sentence violated Michigan sentencing guidelines. In addition, McKenzie's appellate counsel included a one-sentence argument that McKenzie was denied the effective assistance of trial counsel. The Michigan Court of Appeals affirmed the sentence and conviction in an unpublished order, and the Michigan Supreme Court denied [*725] McKenzie's application for review of the second, third, and fourth issues.

First Habeas Corpus Petition

In 1986, McKenzie filed a pro se petition for a writ of habeas corpus in federal court, contending that the state trial court misapplied Michigan law in admitting Quattura's statement to her grandmother, misapplied Michigan law in admitting the photographs of the victim, and made evidentiary rulings that deprived McKenzie of his Sixth Amendment right to confront witnesses against him. The district court concluded that the first two claims were not cognizable habeas claims because they concerned solely state law matters and that McKenzie failed to meet his burden with regard to the third. The district court denied the petition, and McKenzie did not appeal.

Delayed Application for Leave to Appeal

Again acting pro se, McKenzie filed a delayed application for leave to appeal with the Michigan Court of Appeals. In his application, McKenzie raised five issues, including insufficiency of the evidence supporting his conviction. In June

1989, the Michigan Court of Appeals denied the application, and the Michigan Supreme Court subsequently denied an identical application.

Second Habeas Corpus Petition

McKenzie returned to federal court in 1990, filing a second pro se habeas petition that asserted the same five issues raised in his delayed application for leave to appeal. The district court dismissed the petition under the "abuse of the writ" doctrine, and we subsequently denied McKenzie's application for a certificate of probable cause to appeal.

Motion for Relief from Judgment

McKenzie then filed a pro se motion for relief from judgment in the Michigan trial court in early 1995. In the motion, McKenzie argued that his state and federal constitutional rights were violated because "the prosecution failed to prove his guilt beyond a reasonable doubt and the only evidence submitted against him was an erroneously admitted third party hearsay statement," that he had been deprived of the effective assistance of trial and appellate counsel, and that the sentence imposed by the trial court was disproportionate and improper.

The state court ruled that McKenzie was not entitled to relief with respect to the first issue, which the court described as "the admission of a third party statement in evidence," because it "was previously raised on appeal and decided against the defendant by the Court of Appeals." The court therefore determined that the first claim was barred by Michigan Court Rule 6.508(D)(2), which precludes relief if a motion "alleges grounds for relief which were decided against the defendant in a prior appeal." With respect to the remaining two issues, the court ruled that McKenzie was barred from relief pursuant to Michigan's procedural default rule, Michigan Court Rule

6.508(D)(3). The court did, however, appoint McKenzie counsel for purposes of appeal.

Through appointed counsel, McKenzie filed a motion for reconsideration with the trial court with respect to his motion for post-judgment relief. The court denied the motion, and the Michigan Court of Appeals and Michigan Supreme Court denied leave to appeal.

Federal Habeas Corpus Petition

In June 1998, McKenzie asked this court for permission to file a successive habeas petition. Specifically, McKenzie wanted to [*726] present to the district court claims that (1) he had been deprived of the effective assistance of trial and appellate counsel and (2) there had been insufficient evidence to convict him. We ruled that, to avoid a potential miscarriage of justice, McKenzie's claims should go forward:

Upon review, we conclude that the requirements contained in 28 U.S.C. § 2244 do not apply to this case, because applying these requirements would have an impermissible retroactive effect on McKenzie's conduct that predates the passage of the Antiterrorism and Effective Death Penalty Act of 1996 . . ., which enacted the current version of § 2244. Although McKenzie has filed two prior petitions, which might have rendered his proposed petition a successive or abusive petition, we conclude that McKenzie has facially met the gateway standard for permitting review of his claims in order to prevent a fundamental miscarriage of justice. See Schlup *v. Delo*, 513 U.S. 298, 316-17, 130 L. Ed. 2d 808, 115 S. Ct. 851 (1995). Thus, he is entitled to review of the merits of his two asserted claims.

In re McKenzie, No. 98-0157 (6th Cir. May 11, 1999) (citations omitted).

When the case reached the district court, the court denied the state's motion to dismiss, granted McKenzie's motion for appointment of counsel, and referred the petition to a magistrate judge. The magistrate judge held an evidentiary hearing, at which only McKenzie's trial counsel testified. Following the hearing, the magistrate judge issued a report and recommendation that the petition be denied. On the issue that we now find dispositive, insufficiency of the evidence, the magistrate determined that "based upon Quattura's statement to her grandmother that the man she called 'daddy' had assaulted her and the additional circumstantial evidence presented by the prosecution to show opportunity, . . . sufficient evidence was presented such that a juror could have reasonably concluded that Petitioner was guilty of assault with intent to murder."

Overruling McKenzie's objections, the district court adopted the report and recommendation and denied McKenzie's petition. The district court agreed with the magistrate judge regarding the sufficiency of the evidence, noting that "while much of the evidence . . . was circumstantial," there was nevertheless sufficient evidence from which a reasonable juror could find McKenzie guilty beyond a reasonable doubt.

ANALYSIS

Standard of Review

McKenzie raised the sufficiency of the evidence claim in his motion for relief from judgment, filed with the trial court in 1994. In rejecting the motion, the trial court failed to address McKenzie's claim. Instead, the trial court held that the claim had already been raised and decided against the defendant by the Michigan Court of Appeals and dismissed the sufficiency claim under Michigan Court Rule 6.508(D)(2), which precludes relief on grounds "which were decided against the defendant in a prior appeal or proceeding." Our review of the record convinces us that the Michigan appellate court

considered the admissibility of the evidence but not its sufficiency to support McKenzie's conviction.

In our sister circuits, federal claims are reviewed de novo when a state court fails to adjudicate the claim on the merits. See *Schoenberger v. Russell*, 290 F.3d 831, 839 (6th Cir. 2002) (Keith, J., concurring) (collecting cases). In our circuit, by contrast, existing precedent binds us to the strictures of 28 U.S.C. § 2254 [*727] even "when there is no state court decision articulating its reasons." *Harris v. Stovall*, 212 F.3d 940, 943 (6th Cir. 2000). In this instance, however, we believe that Harris is distinguishable. There, the state court issued a summary order granting the prosecutor's motion to affirm. *Id.* Although the court did not explain the basis for its reason, we can safely assume that the state court considered the merits of Harris's claim. Here, with regard to McKenzie's sufficiency claim, the trial court believed that the court of appeals had already considered the claim. However, as noted above, the Michigan appellate court addressed only the admissibility of the evidence, but never directly addressed the specific issue of whether the evidence was sufficient to support McKenzie's conviction. Accordingly, there are simply no results, let alone reasoning, to which this court can defer. Without such results or reasoning, any attempt to determine whether the state court decision "was contrary to, or involved an unreasonable application of clearly established Federal law," 28 U.S.C. § 2254(d)(1), would be futile. If deference to the state court is inapplicable or inappropriate, we "exercise our independent judgment" and review the claim de novo. *Hain v. Gibson*, 287 F.3d 1224, 1229 (10th Cir. 2002); see also *Cox v. Miller*, 296 F.3d 89, 101 (2nd Cir. 2002) (noting that habeas claims are either subject to AEDPA standard or reviewed de novo); *Moore v. Parke*, 148 F.3d 705, 708 (7th Cir. 1998) (reviewing claim de novo once AEDPA deference found to be inappropriate).

Sufficiency of the Evidence

In assessing whether there is sufficient evidence to support McKenzie's conviction, we must determine whether, after viewing the evidence in the light most favorable to the government, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979) (emphasis in original). It is the province of the fact-finder, not this court, to weigh the probative value of the evidence and resolve any conflicts in the testimony. See *i.d.* Furthermore, "circumstantial evidence alone, if substantial and competent, may support a verdict and need not remove every reasonable hypothesis except that of guilt." *United States v. Talley*, 194 F.3d 758, 765 (6th Cir. 1999). However, if the judgment is not supported by "substantial and competent evidence" upon the record as a whole, the judgment must be reversed. See *United States v. Khalil*, 279 F.3d 358, 368 (6th Cir. 2002).

At issue is whether the evidence was sufficient to establish, beyond a reasonable doubt, that McKenzie was the perpetrator of the assault. McKenzie argues that because "there was neither physical evidence, nor eyewitness testimony, that in any way implicated [ ] McKenzie in the assault," no rational trier of fact could have found him guilty. The state counters that the child's hearsay statement to the effect that "Daddy did it," along with the evidence that McKenzie had the opportunity to commit the crime, is sufficient to support his conviction. The district court cited the child's hearsay statement in concluding that the state met its evidentiary burden.

The jury's reliance on Quattura's out-of-court statement is understandable. McKenzie was charged with a brutal assault on a three-year-old child who was badly injured and then abandoned in a vacant building, in a situation that was obviously life-threatening. However, it is in just these circumstances, when the crime itself is likely to inflame the

passions of jurors, that courts must be vigilant in [*728] ensuring that the demands of due process are met.

We consider first the statement implicating McKenzie, evidence the state argues is sufficient to support the conviction. The parties stipulated that Quattura was not competent to testify during the trial. At the time of the assault, she was three years old. According to her doctor, Quattura was "somewhat withdrawn and did not appear normal psychologically" for several weeks after the assault. He described Quattura's condition as an "acutely deranged abnormal condition." According to Juanita Horton, Quattura was "drowsy" and "in a lot of distress" on the day the statement was made. Furthermore, a nurse in the room heard her say "Donna" rather than "Daddy."

Because this was an out-of-court statement and Quattura was deemed incompetent to testify, cross-examination was impossible. Given the age and mental state of Quattura and the conflicting versions of what she said, we find unwarranted the state's reliance on this statement, and virtually this statement alone, to support the petitioner's conviction. While such evidence could certainly be used to add to the prosecution's case, a statement made under circumstances such as those in this case by an "incompetent" declarant simply does not constitute proof beyond a reasonable doubt. Cf. *United States v. Orrico*, 599 F.2d 113 (6th Cir. 1979) (holding past recollection recorded and prior inconsistent statement insufficient, standing alone, to establish central element of alleged offense).

There was circumstantial evidence that suggested McKenzie was in the home and upset the morning Quattura was discovered to be missing. However, there were other people in the home on the morning Quattura was assaulted. Additionally, there was no physical evidence or eyewitness testimony linking McKenzie to the assault on Quattura. Family members testified

that they had never seen McKenzie harm Quattura and could not imagine that he would.

We have grave doubts about the legitimacy of the state trial court's original determination that Quattura's out-of-court statement was admissible as an excited utterance, but that question is one of state law, not reviewable in a federal habeas action "unless [the error] so perniciously effected the prosecution of a criminal case as to deny the defendant the fundamental right to a fair trial." *Kelley v. Withrow*, 25 F.3d 363, 370 (6th Cir. 1994). Although this could potentially provide an alternative ground for granting the writ of habeas corpus, our resolution of the case on other grounds obviates the necessity for us to decide the question. We have, as well, substantial misgivings about trial counsel's failure to address the confrontation issues inherent in the trial court's decision to permit introduction of the "Daddy statement" while ruling inadmissible the "Will statement," but that federal constitutional question is also one we need not reach in view of our ruling on the sufficiency of the convicting evidence. On that score, and given the circumstances of the child's out-of-court statement and the lack of any corroborating evidence, we hold - upon the record as a whole - that the petitioner's conviction is not supported by constitutionally sufficient evidence. Although we can understand why a jury would want to convict someone for the crime involved in this case, the proof is neither substantial nor competent enough to let stand the jury's verdict finding McKenzie guilty.

CONCLUSION

For the reasons set out above, we REVERSE the judgment of the district court [*729] and REMAND the case with directions to the district judge to issue the writ of habeas corpus.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GERALD McKENZIE,

Petitioner,

vs. Case No. 99-CV-70316

WARDEN, RYAN REGIONAL CORRECTIONAL FACILITY, HON. AVERN COHN

Respondent.

ORDER ADOPTING REPORT AND RECOMMENDATION ISSUANCE OF A CERTIFICATE OF APPEALABILITY

This is a habeas case under 28 U.S.C. § 2254. Petitioner Gerald McKenzie (Petitioner) was convicted by a jury of assault with intent to murder regarding the near death from hypothermia of then three-year-old Quattura Sutton. Petitioner was sentenced to life imprisonment. Petitioner claims he is incarcerated in violation of his constitutional rights and specifically claims that there is insufficient evidence to support his conviction and that he was denied effective assistance of trial and appellate counsel. The matter was referred to a magistrate judge for a report and recommendation (MJRR). The magistrate judge conducted an evidentiary hearing on Petitioner's claims at which Petitioner's trial counsel testified. The magistrate judge analyzed Petitioner's claims in light of the entire record and recommends that the petition be dismissed. Before the Court are Petitioner's objections to the MJRR. As explained below, Petitioner's objections lack merit.

The MJRR sets forth the relevant factual and procedural history of the case, which will not be repeated here.

Petitioner first objects to portions of the recitation of the facts in the MJRR. Petitioner is correct that the victim was found on March 7,1984, not May 7,1984 as stated in the MJRR. Petitioner is also correct that although the victim's mother, Kim Cater testified on direct examination that "she did not do any drugs" on the night in question, as stated in the MJRR, Kim testified on cross-examination that she "probably was" doing drugs that night both before and after she left the house. As explained more fully below, neither error in the MJRR, however, compels a conclusion different than that recommended by the magistrate judge. Thus, this objection fails.

Petitioner next objects to the magistrate judge's finding that Petitioner's conviction is supported by sufficient evidence. While much of the evidence against Petitioner was circumstantial, the victim identified Petitioner as the individual responsible for her injuries by her statement to her grandmother in the hospital that "See grandma, what my Daddy[1] did to me." After a careful review of the trial transcript, the Court is satisfied that viewing all of the evidence in a light most favorable to the prosecution, there was sufficient evidence presented at trial such that a reasonable juror could find Petitioner guilty beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319 (1979). This objection therefore also fails.

Petitioner also objects to the magistrate judge's conclusion that Petitioner was not deprived of the effective assistance of counsel, either by his trial counsel or appellate counsel. The basis for Petitioner's claim was that the victim apparently made a statement a few days after the incident that "Will did

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[1] The evidence at trial revealed that the victim called the Petitioner "daddy," although he is not her biological father.

it." Petitioner says that trial counsel did not fully investigate the identity of 'Will" and if he had, he would have discovered in Kim Carter's statements to the police that she referred to the man who she went to visit that might, Johnny Williams, as "Will." At trial, Petitioner's counsel did attempt to introduce the "Will did it" statement, but the trial court declined to admit it under the rules of evidence. A review of the record shows that one of the victim's cousins who was at the house on the night of the incident was named Will and that was the only individual thought to be the "Will" at the time of trial. While Petitioner's trial counsel may have been deficient in failing to fully investigate the identity of "Will" or cross-examine Kim Carter or Johnny Williams regarding the name "Will," Petitioner suffered no prejudice in light of the trial court's ruling that the "Will did it" statement was inadmissible. See MJRR at p. 20-21. Moreover, Petitioner also cannot show prejudice given the victim's statement identifying Petitioner and the circumstantial evidence of Petitioner's guilt. Thus, this objection lacks merit.

Petitioner's final objection that the Court had not previously ruled on his Confrontation Clause claim lacks merit for the reasons stated in the MJRR at p. 15-16.

Accordingly, the findings and conclusions of the magistrate judge are adopted as the findings and conclusions of the Court, as supplemented above. The petition for habeas corpus is DENIED and this case is DISMISSED.

SO ORDERED.

CERTIFICATE OF APPEALABILITY

Before Petitioner may appeal the Court's decision denying his habeas petition, a certificate of appealability must issue. See 28 U.S.C. § 2253(c)(3); Fed. R. App. P. 22(b); In re Certificates of Appealability, 106 F.3d 1306, 1307 (6th Cir. 1997). A

certificate of appealability may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). In *Slack v. McDaniel* __ U S. __, 120 5. Ct: 1595, 1604 (2000), the United States Supreme Court made clear that where a petition is rejected on the merits, "the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong."

Based upon this standard, a certificate of appealability is ISSUED on the following claims: (1) insufficiency of the evidence, and (2) ineffective assistance of counsel.

S/S
AVERN COHN
UNITED STATES DISTRICT JUDGE

Dated: June 04 2001
Detroit, Michigan

A TRUE COPY
CLERK U.S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
BY S/S
DEPUTY CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GERALD McKENZIE,

Petitioner

- vs - Civil No. 99-70316

WARDEN, RYAN REGIONAL
CORRECTIONAL FACILITY,

Respondent.

JUDGMENT OF DISMISSAL

For reasons stated in the Court's Order Adopting Report and Recommendation, Issuance of Certificate of Appealability entered and filed this date, the petition for writ of habeas corpus is DENIED, and the above case is DISMISSED.

JOHN P. MAYER
CLERK OF THE COURT

By: S/S
Deputy Clerk

Dated: JUN 04 2001

I hereby certify that the foregoing is a true copy of the original on file in this Office.
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
By S/S
Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GERALD MCKENZIE,

Petitioner, Case Number: 99-70316

v. HONORABLE AVERN COHN
HONORABLE MARC L. GOLDMAN

WARDEN, RYAN REGIONAL
CORRECTIONAL FACILITY,

Respondent.

REPORT AND RECOMMENDATION

I. Introduction

This is a petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. On June 26, 1984, Petitioner was convicted of assault with intent to murder, following a bench trial in the Recorder's Court for the City of Detroit. Petitioner is currently incarcerated at the Ryan Correctional Facility in Detroit, Michigan. He is serving a life sentence.

II. Facts

Petitioner's conviction arises out of the near death from hypothermia of then three-year-old Quattura Sutton. Quattura lived with her mother Elena (also known as "Kim") Carter and her mother's boyfriend, Petitioner Gerald McKenzie, in the home of Kim's aunt, Patricia Carter. Patricia Carter's children, Wilbert (9 years old) and Tonya (5 years old), also lived in the home.

During the early morning hours of May 7, 1984, construction worker Thomas Pryor, while on his way to a construction site in downtown Detroit, was flagged down by a woman he had never seen before and whose identity was never determined and told to go to a nearby vacant building. Mr. Pryor entered the vacant building and found three-year-old Quattura Sutton lying unconscious on the floor with her head stuck to frozen blood that had pooled around her head. Mr. Pryor testified that Quattura was dressed only in a light t-shirt and overalls. He further testified that although it was only about seven degrees outside, Quattura did not have on socks, shoes, or an overcoat. Mr. Pryor picked up Quattura, ran outside and found police officer James Fintor, who took Quattura to the hospital.

Quattura remained in the hospital for seven days. The emergency room physician, David Treloar, testified that Quattura was in critical condition when she was brought to the hospital. She was suffering from severe, life-threatening hypothermia. He also testified that she had numerous bruises on her face and head, a small amount of bleeding in the back of her head, and some blood above her eye. Dr. Treloar testified that these injuries, absent the hypothermia, were not life-threatening. He further testified that these injuries were suggestive of abuse rather than an accidental fall and that they were the result of considerable force and therefore likely to have been caused by an adult rather than a child.

Kim Carter testified that she and Petitioner had been living together since Quattura was approximately one year old. Although Petitioner was not Quattura's biological father, Kim testified that Quattura called him "daddy" Tr. Trans., Vol. II, p. 8. Kim also testified that she never observed Petitioner threaten or hit Quattura. On the night in question, Kim claimed to have come home at about 7:00 p.m. Shortly thereafter, Petitioner arrived home. At approximately 9:00 p.m., Petitioner's friend, Darrell Reed, came over and Reed and Petitioner "shot some drugs." *Id.* at p. 11. Kim testified that she

did not do any drugs at that time. After some time, she and Petitioner walked Reed to the bus station. They then both returned home. At approximately 1:00 a.m., Kim told Petitioner she was going to leave to try to get money for drugs. Petitioner gave her a coat she could pawn for money. Kim testified that, when she left the house, Quattura was asleep on the couch in the living room, and her niece and nephew, Wilbert and Tonya, were sleeping on a couch in the dining room. She further testified that when she was leaving, Petitioner told her he would lock the door behind her and that he would sleep on the couch with Quattura.

Kim testified that although she told Petitioner she was going to borrow some money to get drugs and would then return, she did not intend to return. She planned to go over to another man's house, Johnnie Williams. She testified that she spent the night at Williams' house taking drugs. Kim called her mother at approximately 11:00 a.m. the next morning. Kim's mother told her that Quattura had been rushed to the hospital.

Johnnie Williams testified at trial that Kim Carter came over to his house at approximately 12:00 or 12:30 a.m. on March 7, 1984. He and Kim spent the night shooting, smoking, and snorting drugs. Williams further testified that he did not fall asleep until daybreak and that from the time Kim came over to his house until he fell asleep, Kim did not leave the house.

Patricia Carter, Kim Carter's aunt, testified that she went to bed at approximately midnight on the evening of March 6th. When she went to bed, Wilbert and Tonya were asleep on a couch in the dining room and Quattura was asleep on a couch in the living room. She also testified that Petitioner was in the house when she went to sleep. Patricia stated that she slept through the night until Petitioner woke her up by knocking on her bedroom door at approximately 6:30 or 7:00 a.m. Talking through the closed door, Petitioner asked Patricia whether she had seen Quattura or Kim. Patricia and Petitioner then began

searching the house, but they did not find Quattura. Shortly thereafter, Patricia left the house to go shopping. She testified that she did not learn that Quattura had been found in a vacant building until she returned from the store at about noon.

Kim's mother, Juanita Horton, testified that she went to visit Quattura after learning that Quattura was in the hospital. She and Kim were permitted to see Quattura at approximately 1:30 a.m. on March 8th. They were the first family members permitted to see her. Juanita testified that when she was visiting her granddaughter, Quattura said, "See, grandma, what my daddy did to me." Tr., Vol. I, p. 130. The trial court admitted this hearsay statement under the excited utterance exception to the hearsay rule.

Paula Lyttle, a serologist for the City of Detroit Crime Lab, testified at trial regarding various suspected blood samples taken from: (1) a lamp in the Carter house; (2) a carpet at the bottom of the staircase in the Carter house; (3) a child's dress found in the Carter house; (4) the clothing Quattura was wearing when she was found in the abandoned building; and (5) Petitioner's boots. The lamp in the Carter house was found to have Type O blood stains. The carpet at the bottom of the staircase was found to have blood stains, but the quantity of blood was insufficient for typing. The child's dress found in the Carter house was determined to have Type B blood stains. The clothing Quattura was wearing was found not to have any blood stains sufficient for typing. The clothing did, however, contain hair samples which were compared to hair samples taken from Petitioner. Ms. Lyttle testified that the hair samples taken from Quattura's clothing could not have come from Petitioner. Finally, the substance on Petitioner's boots which police suspected was blood tested negative for human blood. Quattura's blood type is O. No testimony was offered regarding Petitioner's blood type.

Defense counsel did not present any witnesses at trial. Petitioner's statement to police was admitted into evidence. In that statement, Petitioner stated that Kim left the house at approximately 1:30 a.m. on March 7th to purchase some drugs. Petitioner stated that he went upstairs to bed at some point shortly after Kim left. Quattura was asleep on the couch when Petitioner went to sleep. He woke up at 6:30 or 7:00 the next morning. She was gone when he woke up.

There were two notations in Quattura's medical records that defense counsel attempted to have admitted into evidence. The first, which the trial court did admit, was written by a nurse who was found to be unavailable for trial. The nurse, who was present when Quattura's grandmother was visiting Quattura, made a notation that Quattura told her grandmother, "Donna did this to me" not, as the grandmother testified "See, grandma, what my daddy did to me." Tr. Trans., Vol. III, p. 13. The second notation was made by a nurse who asked Quattura who hurt her. The nurse made a notation in the chart that Quattura responded, "Will did it." Id. The trial court excluded this testimony, reasoning that, because it was further in time from the assault than the statement, "See, grandma, what my daddy did to me" it did not fall under the excited utterance exception to the hearsay rule.

III. Procedural History

Following a jury trial in the Recorder's Court for the City of Detroit, Petitioner was convicted of assault with intent to murder. On July 20, 1984, he was sentenced to life imprisonment.

Petitioner filed a direct appeal with the Michigan Court of Appeals, presenting the following claims:

I. Reversible error occurred when the trial court gave an Allen charge which substantially departed from the

ABA standard jury instruction adopted in People v. Sullivan, 492 Mich. 324 (1974).

II. The trial judge committed reversible error in ruling that the victim's out of court statement was an excited utterance.

III. The strict application of Michigan Rules of Evidence denied appellant the right to present a defense, and the right to due process of law, as guaranteed by both state and federal constitutions.

IV. It was reversible error for the court to admit photographs four and five.

V. The case should be remanded back to trial court for resentencing in light of new laws urging the usage of the new sentencing guidelines.

The Michigan Court of Appeals affirmed Petitioner's conviction. People v. McKenzie, No. 80131 (Mich. Ct. App. Sept. 19, 1985).[2]

Petitioner then filed an application for leave to appeal in the Michigan Supreme Court, presenting the claims enumerated above as one, three and four. Petitioner also arguably raised an ineffective assistance of counsel claim. His counsel included

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[2] Petitioner's appellate counsel also made a one-sentence reference to an ineffective assistance of counsel claim: "Appellant was denied effective assistance of counsel when his attorney failed to offer the hospital records as business records." Petitioner's brief at p. 18. However, the Michigan Court of Appeals held that this claim was abandoned: "[B]ecause defendant has not presented authority or rationale for his one sentence ineffective assistance of counsel argument, we deem it abandoned." People v. McKenzie, slip op. at 9.

the same sentence referred to by the Michigan Court of Appeals as being insufficient to raise such a claim and added a one-sentence supporting argument, citing Michigan case law.[3] The Michigan Supreme Court denied leave to appeal. People v. McKenzie, No. 77352 (Mich. March 26, 1986).

Petitioner next filed a habeas corpus petition in this court. The case was assigned to United States District Judge Avern Cohn. Petitioner presented three claims for relief: (I) that the trial court erred in admitting the victim's hearsay statement as an "excited utterance"; (2) that the trial court improperly admitted photographs of the victim; and (3) that Petitioner was denied the right to present a defense and to confront witnesses because the Michigan Rules of Evidence were followed during his trial. The petition was denied on January 29, 1987. McKenzie v. Foltz, No. 86-74475 (E.D. Mich. Jan. 29, 1987) (Cohn, J.).

In 1990, Petitioner filed a second petition for writ of habeas corpus in the Untied States District Court for the Western District of Michigan. That petition was dismissed pursuant to the "abuse of the writ" doctrine. McKenzie v. Haskell, No. 90-CV-300 (W.D. Mich). Jan. 27, 1992) (Bell, J.). Petitioner filed an application for a certificate of probable cause to appeal the

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[3] Thus, in her brief in support of Petitioner's application for leave to appeal to the Michigan Supreme Court, Petitioner's counsel's argument of ineffective assistance of trial counsel, in its totality, was as follows:

> Alternatively, Appellant was denied effective assistance of counsel when his attorney failed to offer the hospital records as business records. An attorney with ordinary skill and training would have done so. People v. Garcia, 398 Mich. 250 (1978).

-Petitioner's brief at p. 13.

district court's order, which was denied. He then sought a rehearing on the denial of his application for a certificate of probable cause, which was also denied. McKenzie v. Haskell, Nos. 92-1283/92-1459 (6th Cir. June 12, 1992).

Thereafter, Petitioner returned to the state trial court and filed a pro se motion for relief from judgment or, in the alternative, for a Ginther[4] hearing, presenting the following claims:

I. Defendant was deprived of his state and federal constitutional rights and his conviction should be vacated where the prosecution failed to prove his guilt beyond a reasonable doubt and the only evidence submitted against him was an erroneously admitted third party hearsay statement.

II. Defendant was deprived of his state and federal constitutional rights to effective assistance of trial and appellate counsel, and at a minimum, should be granted a Ginther hearing where:

A. Trial counsel failed to investigate key evidence or to request the production of the nurses who were present in the hospital room with the victim when the alleged statement was made.

B. Appellate counsel failed to raise the herein claims on his appeal of right.

III. Defendant should be resentenced where the trial court exceeded his recommended guidelines, and in addition, erroneously sentenced him as a murderer,

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[4] People v. Ginther, 390 Mich. 436, 443 (1973) [requiring a convicted person who is claiming ineffective assistance of counsel based on facts not of record to present those facts at the trial court level in the form of a motion for new trial].

> when he was charged and convicted of assault with intent to commit murder.

The trial court denied Petitioner's motion for relief from judgment. People v. McKenzie, No. 84-1886 (Detroit Recorder's Court Jan. 18, 1995). With respect to Petitioner's claims of ineffective assistance of counsel, the trial court held that Petitioner did not show "good cause" as to why he abandoned this argument on appeal. The trial court failed to address Petitioner's claim of ineffective assistance of appellate counsel as cause for this "abandonment." Although denying his motion, the trial court did appoint Petitioner counsel for purposes of appealing its decision.

Petitioner, through appointed counsel, filed a delayed application for leave to appeal the trial court's denial of his motion for relief fromjudgment in the Michigan Court of Appeals, presenting the following claims: (1) defendant should be resentenced where the trial court exceeded the guidelines range; (2) appellate counsel was ineffective in failing to argue that Petitioner's life sentence was "shocking to the conscience"; and (3) insufficient evidence was presented to convict Petitioner where the only evidence against him was an erroneously admitted third party hearsay statement. The Michigan Court of Appeals denied leave to appeal. People v. McKenzie, No. 191695 (Mich. Ct. App. June 10, 1996).

Petitioner filed a *pro se* delayed application for leave to appeal in the Michigan Supreme Court, presenting the same claims presented to the Michigan Court of Appeals, which was also denied. People v. McKenzie, No. 106965 (Mich. March 28, 1997).

Petitioner then filed a motion in the United States Sixth Circuit Court of Appeals for an order authorizing the district court to consider a successive petition on the grounds that: (I) his conviction is not supported by sufficient evidence; and (2) he

received ineffective assistance from his trial and appellate counsel. The Sixth Circuit Court of Appeals held:

> [T]he requirements contained in 28 U.S.C. § 2244 do not apply to this case, because applying these requirements would have an impermissible retroactive effect on McKenzie's conduct that predates the passage of the [AEDPAII . . . which enacted the current version of § 2244.... Although McKenzie has filed two prior petitions, which may have rendered his proposed petition a successive or abusive petition, we conclude that McKenzie has facially met the gateway standard for permitting review of his claims in order to prevent a fundamental miscarriage of justice.
>
> *See* Schlup v. Delo, 513 U.S. 298, 316-17 (I995). Thus, he is entitled to review of the merits of his two asserted claims.
>
> Accordingly, the motion seeking permission to file a successive § 2254 habeas corpus petition is hereby denied as unnecessary, and this case is hereby transferred, pursuant to 28 U.S.C. § 1631, to the United States District Court for the Westerr District of Michigan for further proceedings, which may well include an evidentiary hearing to examine both claims, but especially the merits of McKenzie's claim of ineffective assistance of trial and appellate counsel.

In re: McKenzie, No. 98-0157 (6th Cir. May 11, 1999). The United States District Court for the Western District of Michigan subsequently transferred the case to this Court.

Respondent filed a motion to dismiss the petition on September 21, 1999. On March 20, 2000, this Court issued an Order denying Respondent's motion to dismiss, granting Petitioner's motion for appointment of counsel, and referring the case to the undersigned for a report and recommendation.

An evidentiary hearing was conducted on December 5, 2000, during which. Petitioner presented a single witness, trial counsel Jeffrey Edison.

IV. Analysis

A. Standard of Review

The Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214 ("AEDPA") altered the standard of review federal courts must apply when reviewing applications for a writ of habeas corpus. The AEDPA applies to all habeas petitions filed after the effective date of the act, April 24, 1996. Because petitioner's application was filed after April 24, 1996, the provisions of the AEDPA, including the amended standard of review, apply to this case.

As amended, 28 U.S.C. § 2254(d) imposes the following standard of review that a federal court must utilize when reviewing applications for a writ of habeas corpus:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable

> application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

28 U.S.C. §2254(d). Therefore, federal courts are bound by a state court's adjudication of a petitioner's claims unless the state court's decision was contrary to or involved an unreasonable application of clearly established federal law. Franklin v. Francis, 144 F.3d 429 (6th Cir. 1998). Additionally, this Court must presume the correctness of state court factual determinations. 28 U.S.C. § 2254(e)(l)[5]; *see also* Cremeans v. Chapleau, 62 F.3d 167, 169 (6th Cir. 1995) ("We give complete deference to state court findings unless they are clearly erroneous").

The United States Supreme Court has explained the proper application of the "contrary to" clause as follows:

> A state-court decision will certainly be contrary to [the Supreme Court's] clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases. . . .

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[5] 28 U.S.C. § 2254(e)(l) provides, in pertinent part:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct.

> A state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from [the Court's] precedent.

Williams v. Taylor, 120 5. Ct. 1495, 1519-20 (2000).

With respect to the "unreasonable application" clause of § 2254(d)(1), the United States Supreme Court held that a federal court should analyze a claim for habeas corpus relief under the "unreasonable application" clause when "a state-court decision unreasonably applies the law of this Court to the facts of a prisoner's case." Id. at 1521. The Court defined "unreasonable application" as follows:

> [A] federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable...
>
> [A]n unreasonable application of federal law is different from an incorrect application of federal law. . . . Under § 2254(d)(l)'s "unreasonable application" clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

Id. at 1521-22.

With this standard in mind, I will proceed to the merits of the petition for a writ of habeas corpus.

B. Sufficiency of the Evidence

Petitioner's first claim is that the evidence presented at trial was insufficient to support a conviction of assault with intent to murder.

Petitioner presented this claim to the state court for the first time in his 1994 motion for relief from judgment filed in the trial court pursuant to M.C.R. 6.500.[6] In denying the motion for relief from judgment, the trial court failed to explicitly address Petitioner's sufficiency of the evidence claim. *See* People v. McKenzie, No. 84-1886 (Detroit Recorder's Court Jan. 18, 1995). Petitioner also presented this claim in his applications for leave to appeal to the Michigan Court of Appeals and Michigan Supreme Court, neither of which addressed the claim. People v. McKenzie, No. 191695 (Mich. Ct. App. June 10, 1996); People v. McKenzie, No. 106965 (Mich. March 28, 1997).

Where a state court fails to address the merits of a claim, a federal court, on habeas review, must conduct an independent

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[6] Petitioner stated the claim as follows:

> Defendant was deprived of his state and federal constitutional rights and his conviction should be vacated where the prosecution failed to prove his guilt beyond a reasonable doubt and the only evidence submitted against him was an erroneously admitted third party hearsay statement.

Petitioner's Motion for Relief from Judgment, p. 3.

review of the state court's decision. Harris v. Stovall, 212 F.3d 940, 943 (6th Cir. 2000). This independent review requires the federal court to "review the record and applicable law to determine whether the state court decision is contrary to federal law, unreasonably applies clearly established law, or is based on an unreasonable determination of the facts in light of the evidence presented." Id. However, the independent review "is not a full, de novo review of the claims, but remains deferential because the court cannot grant relief unless the state court's result is not in keeping with the strictures of the AEDPA." Id. In this case, the last state court to issue a reasoned opinion on Petitioner's claims, the trial court, failed to address Petitioner's claim of insufficient evidence. The Michigan Court of Appeals and Michigan Supreme Court both denied Petitioner leave to appeal in standard, one-sentence orders lacking any reasoning. Therefore, this Court must conduct an independent review of Petitioner's claim that there was insufficient evidence to convict him of assault with intent to murder. *See* Harris, 212 F.3d at 943.

In Jackson v. Virginia, 443 U.S. 307 (1979), the Supreme Court established that the standard of review for a sufficiency of the evidence challenge must focus on whether "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. at 319 (emphasis in original). A federal court may not upset a jury's verdict simply because the evidence does not "rule out every hypothesis except that of guilt beyond a reasonable doubt." Id. at 326.

Petitioner's insufficiency of the evidence claim goes to the issue of identity; that is, whether there existed sufficient evidence to establish, beyond a reasonable doubt, that Petitioner was the perpetrator of the crime. At trial, the prosecution presented evidence that Quattura identified Petitioner as the person who assaulted her and left her in a

vacant building. In addition to Quattura's statement to her grandmother, testimony admitted at trial showed that Petitioner was with Quattura on the night she was assaulted. Kim Carter testified that Petitioner told her he was going to sleep on the couch with Quattura. Petitioner was the first person to report Quattura missing. Thus, based upon Quattura's statement to her grandmother that the man she called "daddy" had assaulted her and the additional circumstantial evidence presented by the prosecution to show opportunity, I conclude that sufficient evidence was presented such that a juror could have reasonably concluded that Petitioner was guilty of assault with intent to murder.

As part of his argument that insufficient evidence was admitted at trial to establish his guilt, Petitioner argues that the trial court erroneously admitted Quattura's "See, grandma, what my daddy did to me," statement while excluding her later "Will did it" statement, thereby violating his rights under the Confrontation Clause. In his Supplemental Brief in support of his habeas corpus petition, Petitioner states that this Confrontation Clause claim is not presented as a separate, independent issue, but as support for his insufficient evidence and ineffective assistance of counsel claims. He further contends that, although this issue was presented in his first habeas corpus petition, the Court never addressed it.

Petitioner's claim that the district court did not address this claim is directly contradicted by the record. In denying Petitioner's first habeas corpus petition, Judge Avern Cohn held, in pertinent part:

> The [third] habeas claim is that Petitioner was denied the right to present a defense and to confront witnesses because the Michigan Rules of Evidence were followed during trial. Three evidentiary rulings by the trial court are cited as resulting in constitutional violations: [admission

> of the statement,"See, grandma, what my daddy did to me"; admission of the nurse's notation that Quattura said "Donna" did this; and the trial court's exclusion of the statement "Will did it."].
>
> . . .
>
> The Sixth Amendment grants criminal defendants the right of confrontation, including the opportunity to test credibility of witnesses through cross-examination. Davis v. Alaska, 415 U.S. 308, 315-16 (1974). Petitioner fails to allege how he was denied confrontation....
>
> The only possible "Will" involved was Wilbert Carter, Quattura's nine-year old cousin who lived in her household. He testified and was subject to cross-examination. The "Will" notation was excluded under the state law hearsay rule....
>
> . . . .
>
> Petitioner has failed to demonstrate how these three evidentiary rulings either denied him a fundamentally fair trial or a specific. constitutional right. . . . This Court does not find that the alleged trial court errors rise to a constitutional magnitude.

McKenzie, slip op. at 2-6.

Thus, the issue of whether Petitioner's rights under the Confrontation Clause were violated by the trial court's evidentiary rulings was previously presented to and decided by Judge Cohn.

In allowing Petitioner to file a successive petition, the Sixth Circuit limited this Court's review to two claims: sufficiency of the evidence and ineffective assistance of trial and appellate counsel. In re: McKenzie, slip op. at 1. Petitioner did not receive permission to present, for a second time, his Confrontation Clause claim. I conclude that Petitioner cannot raise an alleged Confrontation Clause violation as support for his ineffective assistance of counsel or sufficiency of the evidence claims when this Court previously held that his Confrontation Clause claim was meritless. Accordingly, this Court should find that Petitioner is not entitled to habeas corpus relief with respect to this claim.

C. Ineffective Assistance of Trial Counsel

Petitioner next claims that he is entitled to habeas corpus relief because he received constitutionally ineffective assistance of trial counsel. Specifically, Petitioner claims: (i) that his attorney was ineffective in failing to proffer an out-of-court statement by Quattura Sutton as impeachment evidence rather than as an excited utterance; and (ii) that his attorney failed to properly investigate and cross-examine witnesses.

As an initial matter, I note that although the last state court to address Petitioner's ineffective assistance of counsel claim, the trial court, held that the claim was barred from review by a state procedural rule, this claim is not barred from review in

this Court by procedural default.[7] The doctrine of procedural default provides:

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default, and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman v. Thompson, 501 U.S. 722, 750 (1991).

In its decision permitting Petitioner to file a successive habeas corpus petition, the Court of Appeals for the Sixth Circuit held that this Court should address the merits of Petitioner's ineffective assistance of counsel claims "to prevent a fundamental miscarriage ofjustice." People v. McKenzie, slip

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[7] The last state court to address Petitioner's ineffective assistance of counsel claim, the trial court held, in pertinent part:

> The second issue defendant raises is ineffective assistance of counsel. However, defendant previously raised this issue on appeal, the Court of Appeals deemed it abandoned because he did not present any authority or rationale for this argument. Defendant has not shown "good cause" as to why he abandoned this argument on appeal.

People v. McKenzie, No. 84-1886 (Detroit Recorder's Court Jan. 18, 1995).

op. at 2. Accordingly, pursuant to the Court of Appeals Order and the United States Supreme Court's decision in Coleman, 501 U.S. at 750, Petitioner's ineffective assistance of counsel claims are not barred from review by procedural default.

As discussed earlier, where a state court fails to address the merits of a claim, a federal court, on habeas review, must conduct an independent review of the state court's decision. Harris v. Stovall, 212 F.3d 940, 943 (6th Cir.2000). In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court established a two-pronged test for determining whether a petitioner has received ineffective assistance of counsel. First, a petitioner must prove that counsel's performance was deficient, which "requires a showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." Id. at 687. Second, a petitioner must show that counsel's deficient performance prejudiced petitioner. A petitioner may establish prejudice by "showing that counsel's errors were so serious as to deprive the defendant of a fair trial." Id.

The Supreme Court emphasized that, when considering an ineffective assistance of counsel claim, the reviewing court should afford counsel a great deal of deference:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate

> the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

Id. at 689 (internal citations omitted).

The Court further explained that, to establish deficient performance, a petitioner must identify acts that were "outside the wide range of professionally competent assistance." Id. To satisfy the prejudice prong, a petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. The Sixth Circuit, applying the Strickland standard, has held that a reviewing court therefore must focus on whether counsel's alleged errors "have undermined the reliability of and confidence in the result." McQueen v. Scroggy, 99 F.3d 1302, 1311 (6th Cir. 1996), *cert. denied* 520 U.S. 1257 (1997).

Petitioner claims that trial counsel Jeffrey Edison was ineffective for failing to proffer Quattura's out-of-court statement that "Will did it" as impeachment evidence rather than as an excited utterance. The record, however, belies that argument.

Mr. Edison argued that the "Will did it" statement should be admitted under the present sense impression or excited utterance exceptions to the hearsay rules or as impeachment evidence. The trial court rejected admission under all of these theories. Thus, Petitioner's claim that Mr. Edison failed to

offer this statement as impeachment evidence is meritless. Moreover, to the extent that Petitioner's claim is based upon the skill with which Mr. Edison articulated the basis for admitting this statement for impeachment purposes, such a claim is also meritless. When a federal court on habeas review considers whether an attorney was constitutionally ineffective, the test is not whether an attorney could have articulated an argument more effectively or more eloquently. The test is that set forth in Strickland: whether the attorney's assistance was reasonable considering all of the circumstances. 466 U.S. at 688. Mr. Edison argued that the out-of-court statement should be admitted, *inter alia*, for impeachment purposes. The trial court judge recognized and rejected the proffer on this basis. Thus, while Mr. Edison perhaps could have more effectively articulated his argument, his representation ensured that the trial was a "reliable adversarial testing process." Id.

Petitioner also argues that Mr. Edison was ineffective because he failed to adequately Investigate and cross-examine witnesses. In particular, Petitioner claims that Mr. Edison failed to investigate the identity of the "Will" referred to by Quattura Sutton. Petitioner argues that his attorney and the trial court judge operated under the misapprehension that the only "Will" having any connection to Quattura was her nine-year-old cousin Wilbert, when, according to Petitioner, Johnnie Williams, who spent the night of May 7, 1984 with Kim Carter, was also known as "Will." Petitioner argues that if Mr. Edison had effectively investigated the case, he would have learned that Kim Carter referred to Johnnie Williams as "Will" in two separate police reports and elicited that testimony from her on cross-examination.

However, Petitioner's argument is specious in light of the trial court's evidentiary ruling excluding Quattura's statement that "Will did it." Absent admission of that statement, any evidence identifying someone named "Will" would have been meaningless to the jury and would not have exonerated

Petitioner. Thus, even assuming that counsel's failure to investigate the identity of "Will" was unreasonable, Petitioner has failed to show any resulting prejudice.

Accordingly, this Court should deny habeas corpus relief with respect to this claim.

D. Ineffective Assistance of Appellate Counsel

Finally, Petitioner claims that he is entitled to a writ of habeas corpus because he received constitutionally ineffective assistance of appellate counsel. Petitioner argues that his appellate counsel was ineffective for failing to raise his claims of sufficiency of the evidence and ineffective assistance of trial counsel on direct appeal. Petitioner has failed to show that appellate counsel was ineffective. To satisfy the Strickland test, Petitioner must establish both that counsel's conduct was unreasonable and that Petitioner was prejudiced by counsel's conduct. I have already concluded that Petitioner's sufficiency of the evidence and ineffective assistance of trial counsel claims lack merit. Therefore, I conclude that appellate. counsel's failure to raise meritless claims was neither unreasonable nor prejudicial. Accordingly, the Court should deny habeas corpus relief with respect to this claim.

V. Conclusion

For the reasons stated above, I find that Petitioner has not established that he is entitled to habeas corpus relief. Accordingly, I respectfully recommend that the petition for a writ of habeas corpus be DENIED.

Pursuant to Rule 72(b) of the Federal Rules of Civil Procedure and 28 U.S.C. 636(b)(l), the parties are hereby notified that within ten days after being served with a copy of this recommendation they may serve and file specific, written objections to the proposed findings and recommendations.

Further, either party may respond to another party's objections within ten days after being served with a copy thereof. The parties are further informed that failure timely to file objections may constitute a waiver of any further right of appeal to the United States Court of Appeals. United States v. Walters, 638 F.2d 947 (6th Cir. 1981).

In accordance with the provisions of Rule 6(b) of the Federal Rules of Civil Procedure, the court, in its discretion, may enlarge the period of time in which to file objections to this report.

S/S
MARC L. GOLDMAN
UNITED STATES MAGISTRATE JUDGE

DATE: 03/29/01

98-0157
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: GERALD MCKENZIE,

Movant.

ORDER

Before: MERRITT, NORRIS, and GILMAN, Circuit Judges.

Gerald McKenzie, a pro se Michigan state prisoner, moves the court pursuant to 23 U.S.C.A. § 2244(b)(3)(A) (West 1998) for an order authorizing the district court to consider a successive habeas corpus petition to be filed under 2S U.S.C. § 2254.

McKenzie seeks to challenge his March 1984 jury conviction for an unwitnessed assault with intent to commit murder, for which he is serving a life sentence, on the grounds that: 1) his conviction is not supported by sufficient evidence; and 2) he received ineffective assistance from his trial and appellate counsel.

Upon review, we conclude that the requirements contained in 2? U.S.C. § 2244 do not apply to this case, because applying these requirements would have an impermissible retroactive effect on McKenzie's conduct that pre-dates the passage of the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214 (1996), which enacted the current version of § 2244. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 275 (1994), *In re Green*, 144 F.3d 384, 336 (6th Cir. 1998) (per curiam); *In re Heckerd*, 123 F.3d 922, 934 (6th Cir. 1997). Although McKenzie has filed two prior petitions, which may have rendered his proposed petition a successive or abusive petition, we conclude that McKenzie has facially met the gateway standard for permitting review of his claims in

order to prevent a fundamental miscarriage of justice. *See Schlup v. Delo*, 513 U.S. 298, 316-17 (1995). Thus, he is entitled to review of the merits of his two asserted claims.

Accordingly, the motion seeking permission to file a successive § 2254 habeas corpus petition is hereby denied as unnecessary and this case is hereby transferred, pursuant to 28 U.S.C. § 1631, to the United States District Court for the Western District of Michigan for further proceedings which may well include an evidentiary hearing to examine both claims, but especially the merits of McKenzie's claim of ineffective assistance of trial and appellate counsel. *See O'Hara v. Wigginton*, 24 F.3d 323, 328 (6th Cir. 1994) (failure to investigate, especially as to key evidence, must be supported by a reasoned and deliberate determination that investigation was not warranted); *Sims v. Livesay*, 970 F.2d 1575, 1530-81 (6th Cir. 1992) (counsel has "'a duty to make reasonable investigations or *to make a reasonable decision that makes particular investigations unnecessary*'," quoting *Strickland v. Washington*, 466 U.S. 668, 691 (1984) (emphasis added in *Sims*)); *Workman v.Tate*, 957 F.2d 1339, 1345-46 (6th Cir. 1992) (reasonable investigation was lacking and hence counsel's performance was deficient).

ENTERED BY ORDER OF THE COURT

S/S

Clerk

454 Mich. 884; 562 N.W.2d 203;
1997 Mich. LEXIS 649, *

STATE OF MICHIGAN
SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,

v.

GERALD McKENZIE, Defendant-Appellant.

SC: 106965

SUPREME COURT OF MICHIGAN

454 Mich. 884; 562 N.W.2d 203; 1997 Mich. LEXIS 649

March 28, 1997, Decided

PRIOR HISTORY: [*1] LC: 84-188601. COA: 191695.

OPINION:

On order of the Court, the delayed application for leave to appeal is considered, and it is DENIED, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

Court of Appeals, State of Michigan

ORDER

People v Gerald McKenzie

Docket # 191695

L.C. # 84-188601

Peter D. O'Connell
Presiding Judge

Michael J. Kelly
Kathleen Jansen

Judges

The Court orders that the delayed application for leave to appeal is DENIED for failure of the defendant to meet the burden of establishing entitlement to relief under MCR 6.508(D).

A true copy entered and certified by Ella Williams, Chief Clerk, on

JUN 10 1996

S/S

STATE OF MICHIGAN
IN THE RECORDER'S COURT FOR THE CITY OF DETROIT

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v

Recorder's Court
Case No. 84-1886

GERALD MCKENZIE,

Hon. Karen Fort Hood

Defendant.

OPINION

A jury convicted defendant of Assault with Intent to Commit Murder, MCL 750.83; MSA 28.278 on June 26, 1984. He was sentenced to life imprisonment. The Court of Appeals affirmed his conviction in a per curiam opinion dated September 19, 1985. Our Supreme Court subsequently denied leave to appeal on March 26, 1986. In 1986 and 1990, defendant filed petitions for Writs of Habeas Corpus in federal court which were summarily dismissed. Defendant now files this Motion for Relief from Judgment raising three issues.

The first issue, regarding the admission of a third party statement in evidence, was previously raised on appeal and decided against the defendant by the Court of Appeals. Therefore, this Court will deny relief on this issue pursuant to MCR 6.508(D)(2).

The second issue defendant raises is ineffective assistance of counsel. However, defendant previously raised this issue on appeal, but the Court of Appeals deemed it abandoned because he did not present any authority or rationale for this argument. Defendant has not shown "good cause" as to why he

abandoned argument on appeal. MCR 6.508(D)(3). Thus, this Court will deny relief on this issue.

Defendant finally argues that he should be resentenced because the trial court allegedly exceeded the recommended guidelines. Again, defendant has not shown "good cause" as to why he failed to raise this issue on appeal. MCR 6.508(D)(3). Accordingly, relief on this issue is also denied.

Dated: JAN 18 1995 S/S
Recorder's Court Judge

ORDER

At a session of said court held in the Frank Murphy Hall of Justice on JAN 18 1995
Present: Honorable HON. KAREN FORT HOOD
Recorder's Court Judge

In the above-entitled cause, for the reasons set forth in the foregoing Opinion;

IT IS HEREBY ORDERED that Defendant's Motion for Relief from Judgment is DENIED.

S/S
Recorder's Court Judge

Nos. 92-1283/92-1459

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
MAY 14 1992
Leonard Green, Clerk

GERALD MCKENSIE,

Petitioner-Appellant,

v.

ORDER

DAVIS HASKELL, Warden,

Respondent-Appellee.

Gerald McKensie appeals the district court's dismissal of his petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. The receipt of the certified record has been construed as an application for a certificate of probable cause pursuant to Fed. R. App. P. 22(b).

McKensie was convicted of assault with intent to murder and sentenced to life imprisonment. In his petition for writ of habeas corpus, McKensie alleges numerous claims. However, the district court concluded that McKensie's present habeas petition constituted abuse of the writ and dismissed the petition.

Upon review the court agrees that McKensie's present habeas petition constitutes abuse of the writ. *McCleskey v. Zanz*, 111 S. Ct. 1454, 1457 (1991).

Accordingly, the application for a certificate of probable cause is hereby DENIED.

ENTERED BY ORDER OF THE COURT

/S/

Clerk

Nos. 92-1283/92-1459

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
JUN 19 1992
Leonard Green, Clerk

GERALD MCKENSIE,

Petitioner-Appellant,

v.

ORDER

DAVIS HASKELL, Warden,

Respondent-Appellee.

BEFORE: MILBURN and SILER, Circuit Judges; and CELEBREZZE, Senior Circuit Judge

Petitioner Gerald McKensie seeks rehearing of this courts order entered May 14, 1992, which denied McKensie's application for a certificate of probable cause to appeal an order denying habeas corpus relief under 28 U.S.C. § 2254.

Upon consideration, the court has concluded that it did not act under any misapprehension of law or of fact in its order entered May 14, 1992. Fed. R. App. P. 40(a). Accordingly, it is ordered that the petition for rehearing be DENIED.

ENTERED BY ORDER OF THE COURT

S/S
Clerk

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

GERALD MCKENZIE,

Petitioner, Case No. 2:90-CV-300

v. HON. ROBERT HOLMES BELL

DAVID HASKELL,

Respondent.

ORDER DISMISSING PETITION FOR
WRIT OF HABEAS CORPUS

This matter is before the Court on a petition for writ of habeas corpus. On October 3, 1991, United States Magistrate Judge Timothy P. Greeley issued a report and recommendation recommending that the petition for habeas corpus be dismissed pursuant to the "abuse of the writ" doctrine. Petitioner filed objections to the report and recommendation on October 21, 1991.

This court is required to make a de novo review upon the record of those portions of the magistrate's report and recommendation to which objection has been made. Fed.R.Gov. § 2254 Cases 8(b) (4).

Upon review of petitioner's objections the Court finds that the issues raised have been fully and properly addressed in the report and recommendation. Accordingly, the Court hereby ORDERS that:

1. The October 3, 1991, Report and Recommendation of the Magistrate Judge is APPROVED and ADOPTED as the opinion of the Court; and

2. Petitioner's petition for habeas corpus is DISMISSED.

Dated: January 27, 1992

S/S
HONORABLE ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE

STATE OF MICHIGAN
SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,

v.

GERALD McKENZIE, Defendant-Appellant.

No. 86893

Supreme Court of Michigan

434 Mich. 878; 1990 Mich. LEXIS 470

February 26, 1990, Entered

JUDGES: [*1]

Dorothy Comstock Riley, Chief Justice, Charles L. Levin, James H. Brickley, Michael F. Cavanagh, Patricia J. Boyle, Dennis W. Archer, Robert P. Griffin, Associate Justices

OPINION: Order

On order of the Court, the delayed application for leave to appeal is considered, and it is DENIED because we are not persuaded that the questions presented should be reviewed by this Court.

Court of Appeals, State of Michigan

ORDER

People v Gerald McKenzie

Docket # 116499

L.C. # 84 01886

Barbara B. MacKenzie
Presiding Judge
Elizabeth A. Weaver
Richard Allen Griffin
Judges

The Court orders that the delayed application for leave to appeal is DENIED for lack of merit in the grounds presented.

S/S

A true copy entered and certified by Norbert G. Jaworski, Chief Clerk, on

June 30, 1989

S/S
Chief Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GERALD MCKENZIE,

Petitioner,

v. CIVIL ACTION NO. 86CV-74475-DT
HONORABLE AVERN COHN

DALE FOLTZ,

Respondent.

MEMORANDUM OPINION AND ORDER

Petitioner, Gerald McKenzie, presently incarcerated at the State Prison of Sourthern Michigan in Jackson, has filed this pro se petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. He was convicted in June 1984 by a Detroit Recorder's Court jury of assault with intent to murder, Mich. Comp. Laws § 750.83. He was sentenced to a term of life imprisonment.

On appeal as of right, the .Michigan Court of Appeals affirmed the conviction in a per curiam opinion dated September 19, 1985. Docket No. 60131. In a standard order dated March 26, 1986, the Michigan Supreme Court denied leave to appeal. Docket No. 77352.

The habeas petition raises three issues. This Court finds that state court remedies concerning these issues have been sufficiently exhausted. See Picard v. Connor, 404 U.S. 270 (1971); Anderson v. Harless, 459 U.S. 4 (1982).

I.

Two of the habeas issues must be dismissed because they fail to rise to the level of a federal constitutional claim. Petitioner contends that the trial court erred because it (1) improperly admitted the victim's hearsay statement regarding the identity of the perpetrator as falling within the "excited utterance" exception to the Michigan hearsay rule, Michigan Rule of Evidence 803, and (2) improperly admitted photographs four and five depicting the victim's appearance after emergency treatment as relevent to demonstrating the degree of intent by the perpetrator.

Both these claims are presented to this Court, as they were to both state appellate courts, as state law issues. The only violation asserted by Petitioner is that the trial court misapplied state evidentiary rules. It is not alleged that either "error" by the trial court violated Petitioner's federal constitutional rights.. Therefore, because both of these claims are based solely on state law grounds, they are not cognizable in habeas. Pulley v. Harris, 465 U.S. 27 (1984); Long v. Smith, 663 F.2d 18 (6th Cir. 1981), cert. denied, 455 U.S. 1024 (1982).

II.

The remaining habeas claim is that Petitioner was denied the right to present a defense and to confront witnesses because the Michigan Rules of Evidence were followed during trial. Three evidentiary rulings by the trial court are cited as resulting in constitutional violations:

A. The trial court allowed the hearsay statement of the victim regarding the identity of the perpetrator into evidence based on the excited utterance exception to the state hearsay rule.

B. The trial court allowed a stipulation between counsel regarding a nurse's notation of a statement by the victim.

C. The trial court refused to admit evidence of a statement by the victim two days after the assault which would have exculpated the Petitioner.

The evidence presented at trial can be summarized as follows. The victim, three-year old Quattura Sutton, was found in an abandoned building in Detroit on the morning of March 7, 1984. She had been beaten and was suffering from extreme hypothermia due to the subzero temperatures. Quattura had been living with her mother (Elena "Kim" Carter), the Petitioner (who was Kim's boyfriend), and several other relatives. Although. Petitioner was not Quattura's natural father, she had always called him "daddy". The night before the assault occurred, Kim had left the home late in the evening and spent the night with another man, Johnnie Williams.

Approximately 17 hours after Quattura was found, her mother, Kim, and her grandmother, Juanita Horton, came to see her at the hospital. They were the first family members to see the child after the assault. The grandmother approached Quattura and said, "how is grandma's baby?" Quattura said, pointing to her bruised eyes, "see, grandma, what my daddy did to me." Although defense counsel objected, the statement was admitted as an excited utterance. The trial court determined it admissible because this was the first time Quattura had seen her family after the assault and she had not yet had time to contrive or misrepresent.

On Quattura's medical records, a nurse had noted that she thought she heard Quattura say "Donna" instead of "Daddy." Both counsel stipulated to the notation in the medical records and the jury was so informed. (T. III, pg. 20—21).

Two or three days after Quattura's admittance to the hospital, the medical records indicate that when a nurse asked Quattura who injured her, she replied, "Will did it." The trial court denied admission of this second notation on the basis that by the time it was allegedly made, Quattura had time to formulate a story or to concoct an explanation. (T. III, pg. 15). The nurse who made either record could not be determined and the medical records were not offered into evidence. Quattura was found incompetent to testify and appeared before the Jury only as demonstrative evidence.

The Sixth Amendment grants criminal defendants the right of confrontation, including the opportunity to test credibility of witnesses through cross-examination. Davis v. Alaska, 415 U.S. 306, 315-316 (1974) . Petitioner fails to allege how he was denied confrontation. Defense counsel stipulated to oral admission of the "Donna" notation. Even if the nurse who had made the notes had been located, there is no indication that her testimony would have differed from what appeared in the medical records.

The only possible "Will" involved was Wilbert Carter, Quattura's nine-year old cousin who lived in her household. He testified and was subject to cross-examination. The "Will" notation was excluded under the state law hearsay rule. Likewise, Quattura's unsolicited statement to her grandmother was admitted pursuant to hearsay exception. Alleged errors of state law evidentiary rules are not cognizable in habeas. Pulley v. Harris, 465 U.S. 37 (1984). Only if such alleged errors amount to a due process violation are they open to challenge on collateral review. Boffard v. Marshall, 751 F.2d 845, 857 (6th Cir. 1985), cert. denied, 106 S.Ct. 194 (1985). See also Bell v. Arn, 536 F.2d 123 (6th Cir. 1976) (no due process violation where trial court allowed in a statement from the victim as a dying declaration.)

The admission of all out of court statements is not barred by the Sixth Amendment confrontation clause. United States v. Licavoli, 725 F.2d 1040 (6th Cir. 1984), cert. denied, 104 S.Ct. 3535 (1984). When the declarant is not available for cross-examination, it must be shown that the hearsay statements bear adequate "indicia of reliablility." Id., at 1049. Reliability can be inferred if the testimony falls within an established hearsay exception. Ohio v. Roberts, 448 U.S. 56, 66 (1980).

In the instant matter, Quattura's testimony fell within a state. hearsay exception. There is no indication that the hearsay statements were unreliable.

Petitioner has failed to demonstrate how these three evidentiary rulings either denied him a fundementally fair trial or a specific federal constitutional right. See Manning v.Rose, 507 F.2d 889 (6th Cir. 1974); Burks v. Egler, 512 F.2d 221 (6th Cir. 1975), cert. denied, 423 U.S. 973 (1975). This Court does not find that the alleged trial court errors rise to a constitutional magnitude. Accordingly,

IT IS ORDERED that the petition for writ of habeas corpus is DENIED.

IT IS FURTHER ORDERED that Petitioner's request for appointment of counsel is also DENIED.

IT IS ALSO FURTHER ORDERED that Petitioner's motion to dismiss Respondents answer is also DENIED.

S/S
AVERN COHN
UNITED STATES DISTRICT JUDGE

DATED: JAN 2 9 1987

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GERALD MCKENZIE,

Petitioner,

v. CIVIL ACTION NO. 86CV-74475-DT
HONORABLE AVERN COHN

DALE FOLTZ,

Respondent.

JUDGMENT

The above~entitled matter having come before the Court on a Petition for a Writ of Habeas Corpus, Honorable Avern Cohn, United States District Judge, presiding and in accordance with the Memorandum Opinion and Order entered on JAN 29 1987,

IT IS ORDERED AND ADJUDGED that the Petition for Writ of Habeas Corpus be, and the same hereby is DENIED.

Dated at Detroit, Michigan, this 29 day of January, 1987.

APPROVED:

S/S
AVERN COHN
UNITED STATES DISTRICT JUDGE

STATE OF MICHIGAN
SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff—Appellee,

v

GERALD MCKENZIE,

SC: 77352
COA: 80131
LC: 84-01886

Defendant-Appellant.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Archer, J., would grant leave to appeal.

CHIEF JUSTICE G. MENNEN WILLIAMS

By S/S
Clerk, Supreme Court

Dated: March 26, 1986

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff—Appellee,

v Docket #80131

GERALD MCKENZIE,

Defendant-Appellant.

BEFORE: R.J. Danhof,C.J., and R.B. Burns and V.J. Brennan, JJ.

PER CURIAM

Defendant Gerald McKenzie was convicted by a Detroit Recorder's Court Jury in June, 1984, of assault with intent to commit murder, MCL 750.83, MSA 28.273. He was sentenced to life imprisonment and appeals by right.

On the morning of March 7, 1984, three year old Quattura Sutton was found by Thomas Pryor, a construction worker, in an abandoned apartment building near Lawton and Northwestern in Detroit. Pryor testified that it was 7 degrees outside and the temperature inside the vacant building whose doors and windows were broken was at least as cold. Quattura was dressed only in a light T-shirt and overalls, without socks, shoes or a coat. A small puddle of blood was located by Quattura's head, and the frozen blood from her head had stuck her face to the floor.

Pryor had been told by an "unknown" woman about the child. After observing Quattura's mother in the courtroom, Pryor testified that the "unknown" woman was not the mother. Pryor

explained that he had waived down a police car, after finding the child, and two officers took the child to Ford Hospital's emergency room. Officer Fintor testified that Quattura was unconscious, severely beaten, and appeared, to him, to have no vital signs.

Emergency room pediatrician David Treloar, M.D., testified that Quattura was in critical condition when brought to the hospital at 8:08 a.m.; her life was in Jeopardy. She was suffering severe hypothermia and her body temperature was below 80 degrees F. Treloar observed an extensive bruise around the child's left eye, one above the left eye and one in the back of her head. Quattura's right foot was swollen due to frostbite. There was a small amount of bleeding in back of her head and a slight amount of blood above her eye. Treloar opined that it would have required considerable force (as by an adult) to cause Quattura's head injuries. The injuries, he explained, were very new and suggestive of abuse rather than falling or stumbling on the child's part. Treloar also testified that any of the blows would have caused the child to become unconscious immediately, but the child could have regained consciousness later. Treloar did not think that the injuries were so severe as to endanger her life apart from the hypothermia which was life threatening. He indicated that it took two days for the child's physical condition to dramatically improve. Treloar identified exhibits 1-5 as photos taken of Quattura at the hospital. He further testified that she was abnormally shy with the hospital staff for several weeks and psychologically, she was in an "acutely deranged abnormal condition."

Quattura Sutton lived with her mother, Elena Carter (also known as, and hereafter referred to as "Kim") and her mother's boyfriend, defendant Gerald McKenzie, at 2745 Lothrop in the home of Patricia Carter, Kim's aunt. Also residing at the home besides Patricia Carter were Patricia's children, Wilbert (age 9) and Tonya (age 5). Kim's parents, Aaron and Juanita Horton, lived three houses away at 2742 Lothrop.

Kim testified that defendant was her boyfriend and they had been living together for a couple of years since Quattura was about one year old. Although defendant was not Quattura's natural father, she called him "daddy." Kim had never observed defendant punish Quattura in any way.

Kim said that she had come home at about 7:00 p.m. on March 6, 1984, and defendant came in about a half-hour later. At about 9:00 or 10:00 p.m., Darrel Reed, defendant's friend, came over and he and defendant shot drugs, getting high. Kim testified that she and defendant then walked Reed to a nearby bus stop and they returned home. At about 1:00 a.m., Kim told defendant that she was going out to borrow some money so she could buy some drugs. In actuality, Kim planned to meet another man, Johnnie Williams whom she had known for about three months. Earlier that day, Williams had been at her house getting high with defendant, Darrel Reed, and Kim. She had introduced Johnnie to defendant at that time. Williams and Kim planned to meet later that night.

When Kim left the house at about 1:00 a.m., she planned to spend the night with Williams, but she told defendant she was going to borrow $10 from a friend two blocks away and that she would be gone 10 or 15 minutes. She testified that twice before she had stayed out all night and on these occasions, she had disagreements with defendant about her all-night activities. Kim also testified that she had wanted to end her relationship with defendant, but she had not told him.

When Kim left the house, defendant told her not to stay out all night. Defendant was not upset, however, and they had not argued that evening. Defendant gave her a coat that she could pawn to get money.

Kim testified that, when she left the house, her aunt, Patricia, was upstairs and her young cousins were asleep on a dining

room couch. Quattura was asleep on the living room couch. Defendant told Kim he would lay on the couch with Quattura, he would lock the door, and she should ring the bell when she returned. Kim testified that she had never seen defendant hit Quattura.

After Kim left the house, she went to the house where Johnnie Williams stayed, which was about three blocks from her house. Johnnie went out and bought her some uppers, which she shot. She spent the night with Williams and went with him downtown in the morning where he had to appear in traffic court.

Late that morning, she called her mother and learned that Quattura was in the hospital. Kim first went to the police station and then to the hospital with her mother to see Quattura. She and her mother entered Quattura's room at the same time. When she saw how Quattura looked, she started screaming and was led out of the room.

Kim denied touching Quattura on March 6 or 7, 1984.

Johnnie Williams testified that he had been at Kim's house around dusk on March 6, 1984. He stayed about a half-hour, snorting drugs. Defendant and Darrel Reed came to the house while he was there. Later that night, around 12:00 or 12:30 a.m., Kim came to his house to spend the night with him. She went with his the next morning at about 10:00 a.m. to traffic court.

Patricia Carter testified that on the evening in question, she went to sleep around midnight. Defendant and Quattura were in the house at the time, but Kim was not. Quattura was sleeping on the living room couch and Patricia's two children were sleeping on the dining room couch. Patricia Carter testified that she did not wake up until the next morning at which time the defendant asked her (through her bedroom

door) whether she had seen Kim and Quattura. When Carter left her bedroom, defendant was sitting on the bed in his and Kim's bedroom making a "crying like" noise. Carter did not see any tears. She asked defendant if Quattura was in the house and he replied that she was not. Carter found Quattura's boots and coat downstairs, but she did not find the child. Defendant left the house at about 6:30 or 6:45 a.m.

Carter said Kim, the defendant and Quattura had lived with her since the previous October. She had never seen defendant beat, whip, threaten, or hurt Quattura. She testified that she had, however, seen defendant and Kim have disagreements about Kim staying out late.

Wilbert Carter, age 9, testified that he went to sleep at about 8:00 p.m. on the night in question. His mother, Patricia, was upstairs in her bedroom when he went to sleep and defendant and Kim were not in the house at the time. Tonya and Quattura were playing in the living room. Wilbert heard defendant come in the door in the morning, go to Patricia's room and ask questions and then go to his room. Defendant looked like he was crying. He then left the house again. On cross-examination, Wilbert testified that defendant and his mother went through the house looking for Quattura.

Aaron Horton, Kim's father, testified that at about 6:33 a.m., while he was outside warming up his car to go to work (three houses away from Patricia Carter's house), defendant walked over and asked if Horton had seen Kim. Defendant told Horton that Kim had taken the baby out without shoes on. Aaron Horton said defendant appeared to be a little excited, but not upset. He testified that defendant and Kim had been living together for two or three years and defendant, Kim and Quattura had interacted as a family. Horton had never seen defendant beat or whip Quattura.

Juanita Horton testified that when defendant came over to her house that morning (around 6:30 a.m.) he said that Kim had taken the coatless and shoeless baby out of the house.

Juanita Horton went with Kim to the hospital that night to see Quattura. They went into her room together. She thought that they were the first family members to see Quattura. Quattura looked like she was drowsy and suffering from a lot of distress. Juanita Horton approached Quattura and said, "how is grandma's baby?" Quattura then spoke to her. Defense counsel objected on hearsay grounds. The trial court admitted the testimony under the excited utterance exception to the hearsay rule. Juanita Horton then said that Quattura, pointing to her eyes, said, "see, grandma, what my daddy did to me." Juanita Horton testified that Quattura referred to defendant as "daddy.' Quattura had volunteered the statement on her own, and she also made the statement more than once. Quattura put out her arms toward her mother like she wanted to be picked up.

Juanita Horton, like her husband, testified that she had never known defendant to whip or beat Quattura. Juanita Horton was aware of a conflict between defendant and Kim.

Two statements made by defendant to the police were admitted at trial. Officer Marlyss Landers testified that he took a statement from defendant on March 7, 1984, at 1:06 p.m.

Defendant told him that at about 1:00 or 1:30 a.m., Kim said she was going to a friend's house to try to get some money. She took a coat of defendant's with her. Quattura was asleep on the couch when Kim left. Defendant woke up at around 6:00 or 7:00 a.m., and he asked Patricia Carter if Kim got home, but Carter said she had not seen Kim. Defendant had no idea how Quattura left the home. Defendant also said that he had not left the house during the night after Kim had left at 1:30 am.

Detroit Police Sgt. Bernard Brantley testified that defendant also made a statement to him later on March 8, 1984, at 12:30 a.m. In that statement, defendant also said that after Kim left, Quattura was asleep on the couch, and he went upstairs to bed. He woke up Patricia Carter the next morning and asked if Kim had been home. He said he and Patricia had walked around the house and found that Quattura was not there but her coat and shoes were. He said Kim had stayed out all night twice before. He was not upset on the night in question about the fact that Kim was out all night but he was worried about her; that was why he woke up Kim's aunt. He said the last time he used drugs was Tuesday evening when Kim injected him with "mixed jive." Defendant said he had never hit Quattura, and he did not take her out of the house that night. Defendant said Kim told him to leave the door unlocked when she left. Defendant said he did not lay down with Quattura after Kim left, rather he went upstairs.

Quattura was brought into the courtroom and introduced to the jury. The defense rested without introducing any evidence or calling any witnesses.

Defendant raises several issues on appeal, none of which merit reversal. In light of People v Hardin, 421 Mich 296; ___ NW2d ____ (1984), we have reviewed the supplemental instruction which was given to the jury and find that the instruction was neither coercive nor unfair to the defendant. The instruction as given by the trial court did not substantially depart from the ABA 5.4 standard instruction.

There was also no abuse of discretion in the objected to admission of two photographs depicting Quattura while she was hooked up to a heart monitor and an intravenous unit. We have examined the photographs and it is our opinion that exhibits 4 and 5 were helpful in shedding light on the issue of defendant's intent. The defendant requested an instruction for the lesser offense of assault with the intent to do great bodily

harm less than murder. MCL 750.84; MSA 28.279. The charged offense, assault with intent to murder, is a specific intent crime requiring the intent to kill. See Maher v People, 10 Mich 212 (1802) and Roberts v People, 19 Mich 401 (1870). The lesser offense of assault with intent to do great bodily harm is also a specific intent crime. See People v Mack, 112 Mich App 605, 611; 317 NW2d 190 (1981). The jury was faced with determining what, if any, criminal intent defendant possessed at the time of the crime.

The pediatrician had testified that the hypothermia created the life threatening situation rather than the injuries suffered by the child. The jury, however, did not have to accept the doctor's opinion concerning the gravity of the injuries. The doctor also testified that any of the blows to Quattura's head would have rendered her immediately unconscious, but he also opined that consciousness could have been regained sometime later.

In light of the medical testimony, the photographs were instructive because they provided a clear depiction of the child's actual physical condition. The jury would have been able to separate the advanced state of hypothermia from the actual injuries inflicted on the child to determine if the condition and/or injuries suffered at the time of the assault was indicative of assault with intent to kill or assault with intent to do great bodily harm less than murder. The photographs were not gruesome, nor were they admitted to excite passion or prejudice.

In People v Duby, 120 Mich App 2141; 327 NW2D 455 (1982), this Court summarized the law concerning admissions of photographs:

> "Admission of photographic evidence rests within the sound discretion of the trial court. People v Eddington, 387 Mich 552, 562; 198 NW2d 297 (1982). On review, the Court must determine whether the photographs

> were substantially necessary or instructive to show material facts or conditions or whether they were merely calculated to excite passion and prejudice. People Falkner, 389 Mich 682, 685; 209 NW2d 193 (1973); People v Rocha, 110 Mich App 1, 13; 312 NW2d 657 (1981). The substantially necessary test is nearly the same as asking-whether the evidence is helpful in throwing light on any material point in issue. People v Browning, 106 Mich App 516, 523; 308 NW2d 2614 (1981). Photographs which are pertinent, relevant, competent, or material on any issue in the case are not rendered inadmissible merely because they show the details of a gruesome or shocking crime. People v Fuzi 12, 116 Mich App 277; 323 NW2d 358 (1982). Assuming the materiality of photographs, the trial court must still weigh the potential prejudicial effect against probative value. People v Wallach, 110 Mich App 37, 614, fn 6; 312 NW2d 387 (1981)." 120 Mich App at 256-257.

Defendant's final argument is that the trial court's rulings on hearsay statements were abuses of discretion. Again, we disagree. Admission of Quattura's statement that her "daddy" did it, was admissible as an excited utterance under MRE 803(2).

The "daddy" statement arose from the startling occasion, concerned it, and was made before Quattura had time to contrive or misrepresent. Quattura had been brought to the hospital at approximately 8:00 a.m. in critical condition. Her physical condition did not dramatically improve for two days. When Quattura's grandmother and mother came to the intensive care unit at about 1:00 a.m. that night, they were the first family members the young child had seen. There is no doubt that the statement to Quattura's grandmother arose solely from the traumatic and frightening occasion. Defendant's argument on appeal is that the statement could not be admitted

properly as an excited utterance because it was made 17 hours after Quattura was found and was in response to a question. In our opinion Quattura's statement certainly was not in response to the grandmother's greeting, "how is grandma's baby." Likewise, the time gap does not compel the conclusion that the statement was not an excited utterance. See In the Matter of Meeboer, 134 Mich App 24 (19814) which is partially instructive.

In the present case, Quattura told the first family member with whom she spoke. Under the circumstances, she did not have time to contrive or misrepresent.

The trial court also did not abuse its discretion by refusing to admit the statement supposedly made two days later, purportedly noted in the hospital records, that "Will did it." In view of the time gap involved, and the fact that Quattura presumably had the opportunity to talk with numerous persons before that statement was made, the trial court could have reasonably concluded that at that point she had had time to "contrive or misrepresent." See People v McConnell, 420 Mich 852; 358 NW2d 895 (1984), rev'g 122 Mich App 208 (1982).

Defendant argues that his constitutional rights were denied ~hen the trial court refused to admit the "Will did it" statement. The only authority cited by defendant for his argument, Chambers v Mississippi, 410 US 284; 93 S Ct 1038; 35 L Ed 2d 297 (1973), is inapposite. It also is not at all clear from the record that the statement was even made. The only indication in the lower court record that such a statement was made is an indication by counsel that such a notation existed. The nurse who made the record was not produced and the medical records were not offered.

Finally, because defendant has not presented authority or rationale for his one sentence ineffective assistance of counsel argument, we deem it abandoned.

Affirmed. We retain no further jurisdiction.

/s/ Robert J. Danhof
/s/ Robert B. Burns
/s/ Vincent J. Brennan

2003 U.S. App. LEXIS 12561, *

GERALD MCKENZIE, Petitioner-Appellant,

v.

DAVID SMITH, WARDEN, Respondent-Appellee.

No. 01-1824

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

2003 U.S. App. LEXIS 12561

June 19, 2003, Filed

NOTICE: [*1] NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 28(g) LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 28(g) BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

PRIOR HISTORY: *McKenzie v. Smith*, 326 F.3d 721, 2003 U.S. App. LEXIS 7611 (6th Cir.) (6th Cir. Mich., 2003)

DISPOSITION: Petition denied.

JUDGES: BEFORE: SILER, DAUGHTREY, and GILMAN, Circuit Judges.

OPINION: ORDER

The court having received a petition for rehearing *en banc*, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing *en banc*, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied

Constitutional Provisions and Statutes Involved

28 U.S.C. § 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless--

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a

State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

28 U.S.C. § 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b) (1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless--

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to

establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3) (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material

and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d) (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2254 State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of

the United States.

(b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B) (i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e) (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly

certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substance Acts [21 USCS § 848], in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.